No. 4084.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ANTHONY CARNEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the District of Montana.

WHEELER & BALDWIN,
BUTTE, MONTANA,
Attorneys for Plaintiff in Error.

Filed October....., 1923.

.....

Clerk.

OATES & ROBERTS, PRINTERS, BUTTE

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STATEMENT OF THE CASE.

Proceedings Had at the Time of the Filing of the Information.

On May 26, 1922, JOHN L. SLATTERY, as United States Attorney for the District of Montana, appeared in the District Court of the United States for the District of Montana, the Honorable George M. Bourquin, Judge presiding, and asked leave to file an information against the plaintiff in error charging him with having violated the National Prohibition Act in several particulars. The Information was verified by the United

States Attorney on information and belief and is found at pages 2 to 5 of the record.

At the time the request for leave to file the Information was made, the United States Attorney filed and presented to the court two joint affidavits made by Chas. Rodda and Sam Fairchild (R. pp. 6 to 8). These affidavits are as follows:

In the District Court of the United States, in and for the District of Montana.

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Affidavits of Chas. Rodda and Sam Fairchild.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law, depose and say:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during day of April 18, 1922, man known to them as Fred Bolton, and employed by the Montana Gas Co., came to them and complained that at certain premises, 205 W. Quartz St., Butte, Montana, he was refused admission to premises, for the purposes of reading gas meter.

That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occupying same, and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections.

CHARLES RODDA,
SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,
Deputy Collector of Internal Revenue.

Filed May 26, 1922. C. R. Garlow, Clerk.

In the District Court of the United States, in and for the District of Montana.

United States of America,
District of Montana—ss.

AFFIDAVIT.

Charles Rodda and Sam Fairchild, after each being first duly sworn, upon his oath, according to law, deposes and says as follows, to-wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in

connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors.

CHARLES RODDA.
SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

F. J. DALLMAN,
Deputy Collector U. S. I. R. S.

Filed May 26, 1922. C. R. Garlow, Clerk.

Thereafter, and on the date last mentioned, an Order authorizing the filing of the Information was made and entered of record (R. pp. 8 to 9).

At the time the request for leave to file the information was made and leave to file the same was granted, nothing tending to show probable cause to believe that a violation of the National Prohibition Act, as charged in the information, had been committed by anyone, or that any violation of the National Prohibition Act had been committed by the plaintiff in error other than the statements contained in said affidavits, was offered or introduced, and no evidence of any kind tending to show probable cause to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by Anthony Carney, the plaintiff in error, other than the statements contained in said affidavits, was offered or

introduced, and in granting leave to file said information, the court acted solely on the proof contained in said joint affidavits of Chas. Rodda and Sam Fairchild (R. p. 75).

The Information.

The Information contains five counts.

In the First Count it is charged that on or about the 18th day of April, 1922, the plaintiff in error, at and within certain premises situated at 205 West Quartz Street, in the city of Butte, in the State and District of Montana, "did then and there wrongfully and unlawfully manufacture intoxicating liquor, to-wit: moonshine whiskey, the exact character and quantity of which is to informant unknown, without then and there obtaining a permit from the commissioner of internal revenue so to do."

In the Second Count, it is charged that at the same time and place, the plaintiff in error did "wrongfully and unlawfully manufacture intoxicating liquor to-wit: moonshine whiskey, the exact character and quantity of which is to the informant unknown, without making at the time, a permanent record of such manufacture showing in detail the amount and kind of liquor manufactured and the time and place of manufacture."

In the Third Count, it is charged that at the same time and place, plaintiff in error did wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act."

In the Fourth Count, it is charged that at the same

time and place, the plaintiff in error "did wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act.

In the Fifth Count, it is charged that at the same time and place, the plaintiff in error "wrongfully and unlawfully maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act."

Arraignment.

On May 29, 1922, the plaintiff in error appeared in court, was arraigned and entered a plea of not guilty (R. p. 9).

The Trial.

The case came regularly on for trial on May 15, 1923. Fred Bolton, Chas. Rodda and Sam Fairchild were sworn and testified on behalf of the Government and thereupon the Government rested. (R. pp. 76 to 91.)

During the course of the examination of the witness, Bolton, the following proceedings were had. After testifying that on or about April 18, 1922, he went to a residence at 205 West Quartz Street, in the city of Butte, for the purpose of inspecting gas meters, he was allowed over the objection of the plaintiff in error to testify to certain transactions had and statements made in the absence of the plaintiff in error (R. pp. 76 to 80).

During the course of the examination of the witness Chas. Rodda, he was allowed to testify over the objection of the plaintiff in error to certain transactions had

and statements made in the absence of the plaintiff in error (R. pp. 81 to 84). And while testifying on his direct examination, this witness stated that the joint affidavits made by the witness and Sam Fairchild and hereinbefore referred to contains statements which were not true and on the statement of the United States Attorney that he was taken by surprise by this testimony, the court allowed the United States Attorney to impeach the witness (R. pp. 86 to 87).

During the course of the direct examination of the witness, Sam Fairchild, it was made to appear that statements contained in the joint affidavits of the witness and Chas. Rodda, hereinbefore referred to, were false, and the witness was impeached by the government while attempting to prove its case (R. pp. 90-91).

At the conclusion of the examination of the witness Fairchild, plaintiff in error moved for a directed verdict. This motion was denied and in denying the motion, and in the presence of the jury, the court used the following language:

"The evidence is enough to hang a man if he was on trial for murder." Exception was duly saved. (R. p 91.)

After the motion for directed verdict was overruled, Mrs. Anthony Carney, the wife of the plaintiff in error, Mrs. Gannon, Wm. Colmar, Martin Walsh, Joe Nevin and the plaintiff in error, were sworn and testified on behalf of the plaintiff in error (R. pp. 92 to 122).

Thereafter, the witness, Chas. Rodda was recalled by the Government, and over the objection of the plaintiff

in error, was permitted to testify to certain statements said to have been made by Mrs. Carney in the absence of the plaintiff in error.

The Testimony.

The testimony on the part of the government was entirely circumstantial. It appeared from the testimony of each of the witnesses testifying for the government that the entire transaction concerning which they testified, occurred in the absence of the plaintiff in error; that the house in which the liquor, mash and still were stated to have been found, was a double house fitted up for house keeping by two families; that the portions of the house thus fitted up were separated from each other by a hall which extended through the entire length of the building, and that the Carneys lived in the portion of the house across the hall from that portion of the house in which the liquor, mash and still were stated to have been found.

The witness, Rodda also stated that it appeared that the portion of the premises in which the liquor, mash and still were found were being used (R. p. 85), and that at the time the officers searched the premises, Mrs. Carney stated to them that the portion of the building in which the liquor, mash and still were found, were then rented to and used by a man named O'Donnell, and denied that she had any knowledge of or information concerning the use that he was making of the premises or that the liquor, mash or still were kept there (R. pp. 123 to 124). This witness further testified that he arrested the plaintiff in error on the day

after the liquor, mash and still were found. The plaintiff in error stated that the portion of the building in which the articles last mentioned had been found, were rented to another man and that plaintiff in error denied operating the still or knowledge concerning the same (R. pp. 85 and 86).

Charge to the Jury.

While charging the jury, the court made the following statements:

"The evidence in this case is practically all circumstantial, that is to say this—that while this unlawfully accumulation of stills and liquor and moonshine was found fairly at the door of the defendant and in his own house, no one saw him make the liquor. You have only the circumstances to prove whether it's his property and whether he made liquor; no one has testified he owned it or made it." (R. p. 130.)

And further, when referring to the testimony of the plaintiff in error concerning his arrest and the use of the premises in which the liquor, mash and still were found, and the testimony of other witnesses concerning the use of those premises by someone other than the plaintiff in error, as follows:

"Yet he says he hadn't heard of it until Rodda told him; he denies knowledge of still and mash in the premises; that they were rented by O'Donnell and he didn't know anything about it; hadn't smelled anything and produces witnesses whose testimony tends to show that there was a man there named O'Donnell. Now, then, Gentlemen of the jury, if the defendant had no part in

carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, working together in violation of the law? You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored predecessor Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telegraph pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now, Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experiences, conceive what your own conduct would be if across your hallway from your kitchen door of your own house a tenant set up a moonshine outfit and make moonshine whiskey,

would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business?" (R. pp. 130 to 133.)

Plaintiff in error excepted to portions of the charge to the jury. (R. p. 134.)

The trial was concluded on May 15, 1923, and on that day the jury returned into court with their verdict by which they found the plaintiff in error "not guilty" on the charges contained in counts one and two of the Information, and "guilty" in manner and form as charged in counts three, four and five thereof (R. p. 135).

On May 16, 1923, judgment was rendered and sentence passed and it was then and there ordered and adjudged that the plaintiff in error be confined and imprisoned in the county jail at Butte, Montana, for the term of seven months and that he pay a fine of Two Hundred Fifty Dollars ($250.00) and costs taxed at Thirty Nine and 70-100 Dollars ($39.70) and be confined in said county jail until said fine was paid or he was otherwise discharged according to law (R. pp. 135-136).

Thereafter, plaintiff in error served and filed his motion for new trial (R. pp. 137 to 169).

The Motion for New Trial came on for hearing on May 21, 1923. Thereupon the court stated that it did not care to hear oral arguments but permitted the plaintiff in error to file a written brief and the Motion was taken under advisement. On the following day the court

ordered that the motion for new trial be denied, to which ruling of the court plaintiff in error asked for and was granted an exception (R. pp. 169-170).

Thereafter plaintiff in error served and filed his Petition for Writ of Error (R. pp. 50 to 52), Assignment of Errors (R. pp. 52 to 63), and Prayer for Reversal (R. pp. 63 to 64), and an Order allowing Writ of Error was duly signed, served and filed (R. pp. 64 to 66), and Writ of Error and Citation were duly issued, signed, served and filed (R. pp. 66 to 70).

SPECIFICATION OF ERRORS RELIED ON.

1. The court was without authority to grant the request of the United States Attorney for leave to file the Information filed in this case.

2. The affidavits on which the request for leave to file the Information in this case was granted, were not sufficient to move the discretion of the court or to authorize it to grant leave to file the Information filed in this case.

3. The plaintiff in error was improperly arrested, called for trial and tried.

4. The court erred in proceeding with the trial after it appeared from the testimony of the witnesses Rodda and Fairchild on whose affidavits leave to file the Information filed herein was granted, while testifying as witnesses for the Government, on their direct examination, that the affidavits made by them and on which the order granting leave to file the Information was based, were false.

5. The court erred in not withdrawing its leave to file

the Information filed herein and in failing to dismiss the action when it appeared from the testimony of the witnesses Rodda and Fairchild, while testifying on behalf of the Government, that the statements contained in their affidavits on which the court acted in granting leave to file the Information herein, were false.

6. The statements contained in said affidavits and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file the Information herein or to authorize the court in the exercise of judicial discretion, to have granted such request, as a result of which it appears on the face of the record that the plaintiff in error was improperly arrested and called for trial in violation of the provisions of the Fourth and Fifth Amendment to the Constitution of the United States of America.

7. The charge contained in the Third Count of the Information herein, is insufficient in law for this:

That the charge contained in said count does not state facts sufficient to constitute a public offense.

That the facts stated in said count are not sufficient to show a violation of any criminal law of the United States of America.

That said count does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

8. The court erred in overruling the objection of plaintiff in error to the testimony given by the witness Fred Bolton concerning statements made by the wife of plaintiff in error and transactions had in the absence of plaintiff in error.

9. The court erred in overruling the objection of plaintiff in error to the testimony given by the witness Rodda relating to conversations had by him with the wife of the plaintiff in error and transactions had in the absence of the plaintiff in error.

10. The court erred in denying the motion of the plaintiff in error for a directed verdict made at the close of the Government's case.

11. The court erred in stating in the presence of the jury at the time the motion of the plaintiff in error for a directed verdict was denied that "the evidence is enough to hang a man if he was on trial for murder."

12. There is no substantial evidence in this case sustaining the charge contained in the Third Count of the Information herein.

13. There is no substantial evidence in this case sustaining the charge contained in the Fourth Count of the Information herein.

14. There is no substantial evidence in this case sustaining the charge contained in the Fifth Count of the Information herein.

15. The Court erred in its charge to the jury.

16, The Court erred in denying the motion of the plaintiff in error for a new trial.

ARGUMENT.

Specifications of Errors One, Two and Three.

These specifications all relate to the same matters, involve the same facts and require the application of the same principles of law, and will be taken up together.

The contention of the plaintiff in error is that as a result of the filing of the charges contained in the Information filed in the case at bar, on the showing made in the affidavits filed in support of the request for leave to file the Information, he was improperly brought into court and has been deprived of his liberty and property without due process of law. This contention is based upon certain guarantees contained in the Federal Constitution.

The Fifth Amendment of the Federal Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

While it is true as stated by the authorities, that no precise definition of the phrase "due process of law" can be given, yet the courts have frequently defined the phrase in general terms.

As generally held, due process of law means "law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights:

6 R. C. L. p. 434.

It includes all the steps essential to deprive a person of life, liberty or property and requires that all the forms and acts essential to its application and to give it effect, be met. The means that may be employed to accomplish

the purpose of the law is the process. In other words, the process is the mode by which the purpose of the law may be effected:

6 R. C. L. p. 436.

The requirement of due process of law was the result of ages of experience and was established as an essential element of human right long prior to the Revolution in this country and was preserved and guaranteed to the people of this country by the Fifth Amendment to the Constitution of the United States which acts as a limitation upon the powers of the National Government:

6 R. C. L. p. 440.

As applied to judicial proceedings, due process of law means a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, and requires a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and that any prosecution brought shall be brought and conducted according to the prescribed forms and solemnities for ascertaining guilt:

12 C. J. pp. 1190 to 1192.

The provisions embodying this guaranty have received a broad and liberal interpretation. The guaranty is always and everywhere present to protect the citizen against interference with his rights. The term law as used in this guaranty embraces all legal and equitable rules defining human rights, liberties and duties and providing for their enforcement, not only as between man and man, but also between the state and the citi-

zens and the protection extends to the rights of liberty and property in the very broadest sense of the term:

6 R. C. L. p. 436.

The requirement of due process of law extends to every case of the exercise of governmental power and the Government may not, by its agencies, legislative, judicial or executive, disregard the constitutional prohibition. When any right is acquired by a person under the existing law, there is no power in any branch of the Government, to take it away except in the manner prescribed by the Constitution, that is, by due process of law. The purpose of this clause is to exclude arbitrary power from every branch of the Government and it acts as a restraint on the legislative, executive, and the judicial departments of the Government:

6 R. C. L. pp. 444, 445.

The want of due process of law may arise either:

1. From the fact that the law attempted to be enforced is void, or

2. That the forms of law have not been observed:

12 C. J. 1196.

The term "liberty" is used in this constitutional guaranty in a broad sense as including all personal as distinguished from property rights:

12 C. J. 1199.

In criminal cases, due process of law, requires a law creating or defining the crime, a court of competent jurisdiction, accusation presented in the proper manner, notice and opportunity to answer the charge, trial according to the settled course of judicial proceedings

and a right to be arrested only after compliance with the legal requirements authorizing the making of the arrest and the right to be discharged, unless after proceeding had in due legal form, the party charged with violating the law, has been found guilty according to law:

12 C. J. 1202.

The law has established certain tribunals with defined powers and forms of procedure for the arrest and trial of persons charged with crime. Security to the defendant in criminal cases and to the public is only found in a strict compliance with the forms and methods prescribed by law. Jurisdiction comes from following the law, disorder and uncertainty follow a departure therefrom. Neither the prosecution nor the defendant by any act of their own, can change or modify the law by which original prosecutions are controlled. Such prosecutions involve public wrongs, and a breach of public rights, and duties which affect the community, considered as a community, in its social and aggregate capacity. The end they have in view is the prevention of similar offenses, not atonement or expiation for a crime committed. The penalties or punishments for the enforcement of which they are a means to that end are not within the discretion or control of the party accused, for no one has a right, by his own voluntary act, to surrender his liberty. The state, the public have an interest in the preservation of the liberties of the citizen and will not allow them to be taken away without due process of law. Criminal prosecutions proceed on the assumption of such a forfeiture, which to sustain them,

must be ascertained and declared as the law prescribes. The party charged with crime must be brought into court and the trial must be had by the tribunals and in the mode which the constitution and Laws provide without any essential change. The court, the officer prosecuting for the people and the party charged with crime, are each and all entirely without authority to proceed or consent to any proceeding being had in any criminal prosecution except under the conditions and in the manner prescribed by the constitution and statutes:

Territory v. Ah Wah, 4 Mont. 149, 170-171;
Lewis v. U. S. 146, U. S. 370; 36 L. ed. 1011;
Hopt v. Utah, 110 U. S. 578, 28 L. ed. 264.

In the first case cited, by agreement between the state and the defendant then on trial for murder, the case was tried by and submitted to a jury consisting of eleven men. A conviction followed and the verdict and judgment were set aside on the ground that the defendant had been deprived of a right guaranteed to him by the Constitution—the right to trial by jury.

In the last two cases cited, it appeared that the defendant was not personally present throughout the proceeding on the trial of a felony case. Conviction was had in both cases, and the verdicts and judgments were reversed for the reason that the law requiring the personal presence of the defendant at each step taken during the trial of a criminal case was not complied with.

In neither of these cases did it appear that the defendant had objected to proceedings being had in his absence.

In the case of Lewis v. U. S. supra, the Supreme Court of the United States used the following language:

> "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well as of the relations which the accused holds to the public as of the end of human punishment. The natural life, said Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority." (1 Bl. Com. 133.) The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings, involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to any unauthorized methods."
>
> (146 U. S. 374, 36 L. Ed. 1013.)

In each of the cases cited above, the prosecution was commenced in a court having jurisdiction and in the manner prescribed by law, but there was a failure during

the course of the trial to comply strictly with some constitutional or statutory provision supposed to have been made for the protection of the liberty of the defendant.

In the case at bar, the same principles would necessarily apply, though the position of the plaintiff in error here is based upon a failure to meet the requirements of a constitutional provision intended for his protection at the very threshhold of the proceeding.

The constitutional provision referred to is the Fourth Amendment to the Constitution of the United States, which provides that "no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized."

The warrant is the process by which the defendant is brought into court for the purpose of having his guilt or innocence of the crime charged determined and unless the conditions precedent to the issuance of a warrant as prescribed by the Constitution are complied with, it follows logically that the warrant was illegally issued and the defendant improperly brought into court to stand trial and tried for the reason that there has been a failure to proceed according to the forms and in the manner prescribed by law. In other words, there has been a want of due process of law in the case.

It is true that under the Federal Practice now in vogue, all crimes which are not infamous, may be prosecuted either by indictment or by information:

Section 1022 Revised Statutes; 2 Fed. Stat. Ann. Sec. ed. 675.

However, either of these methods presupposed an examination of witnesses, who have personal knowledge of the facts concerning which they testify and a determination by a duly authorized tribunal of the question as to whether or not, on the facts legally proven, there is probable cause to believe that a crime defined by the Laws of the United States has been committed, and that the party charged and for whose arrest the warrant is asked committed that crime, for under the constitutional provision last referred to, a Federal Court has no jurisdiction to direct the issuance of a warrant on an information verified on the information and belief of the United States Attorney alone, but the application for leave to file the Information and for a warrant for the arrest of the accused person must be supported by proof under oath given as the law requires by someone having personal knowledge of the facts showing probable cause for belief that a crime has been committed and that the accused is guilty of the commission thereof:

U. S. v. Smith, 40 Fed. 755;

U. S. v. Baumert, 179 Fed. 735;

U. S. v. Morgan, 222 U. S. 274, 282; 56 L. ed 198, 200.

In the case last cited, in speaking of the rights of a defendant charged by information with crime, the Supreme Court of the United States said:

> "He cannot be tried on an information unless it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause."

So as the Information filed in this case is verified by the United States Attorney on information and belief (R. p. 5) the trial court was entirely without jurisdiction to authorize the filing of the Information filed herein in the absence of other proof or the filing of an Information containing any charge excepting charges for which probable cause was shown by the affidavits presented to the court for its consideration at the time the request for leave to file the Information was made and upon which the court acted in granting that request.

On the record in the case at bar, it appears that the United States Attorney acted upon this view of the law, for at the time the request for leave to file the Information was made by him, he filed with the clerk and presented to the court the affidavits of Chas. Rodda and Sam Fairchild hereinbefore set out. The portions of these affidavits material here are as follows:

"That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

"That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occuupying same, and having fully control of same." (R. pp. 6 and 7.)

"That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein

a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors." (R. pp. 7 and 8.)

It seems clear that these statements are not sufficient to show probable cause for belief that at the time and place mentioned in the Information the plaintiff in error unlawfully had and possessed intoxicating liquor intended for us in violation of Title II of the National Prohibition Act as charged in the Third Count of the Information herein or that at that time and place the plaintiff in error had and possessed property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act as charged in the Fourth Count of the Information or that at the time and place mentioned, the plaintiff in error maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act as charged in the Fifth Count of the Information.

It will be observed that these charges are based upon the provisions of Section 25 and 21 of the National Prohibition Act.

So far as it is material here, Section 25 of the National Prohibition Act provides that it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title.

The Third Count of the Information is based upon a supposed unlawful possession by the plaintiff in error of liquor intended for use in violation of Title II of the National Prohibition Act.

The Fourth Count of the Information is based upon a supposed possession by the plaintiff in error, of property designed for the manufacture of liquor intended for use in violation of Title II of said Act.

Section 21 of the National Prohibition Act, upon which the Fifth Count of the Information is based, so far as it is material here, is as follows:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is * * kept * * in violation of this Title is hereby declared to be a common nuisance."

The words with which the word "kept" are immediately associated in this section of the statute last referred to are such that they plainly mean "kept for sale or barter or other commercial purpose;" in other words, for the purpose and with the intent of violating Title II of the National Prohibition Act:

> Street v. Lincoln Safe Deposit Company, 254, U. S. 88, 92; 65 L. Ed. 151, 153.

It has always been the law unless otherwise provided by statute, that to convict one of crime, requires proof of intention to commit crime:

> Norwitz v. U. S. 282 Fed. 575, 578.

Mere possession of intoxicating liquor or of property designed for the manufacture of intoxicating liquor is not made unlawful for by the sections of the statute

above referred to the unlawfullness declared is conditioned upon the intended use of intoxicating liquor possessed, kept or intended to be manufactured:

Street v. Lincoln Safe Deposit Company, supra.

And possession to be incriminating must be personal and exclusive:

Willsman v. U. S. 286, Fed. 852.

So on the statute, the material matter for consideration is not whether the plaintiff in error possessed intoxicating liquor or property designed for the manufacture of intoxicating liquor or kept intoxicating liquor, but what was the intent of the plaintiff in error with reference to the intoxicating liquor and property designed for the manufacture of intoxicating liquor referred to in Counts 3, 4 and 5 of the Information herein.

It follows that unless it appears from the statements contained in the affidavits above referred to and set out:

1. That the plaintiff in error was in the personal and exclusive possession of intoxicating liquor and that he intended to use that intoxicating liquor in violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the third count of the Information herein, and the trial court was without jurisdiction to authorize the filing of an information charging the offense attempted to be charged in that count.

2. That the plaintiff in error was in the personal and exclusive possession of property designed for the manufacture of intoxicating liquor intended for use in

violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the Fourth Count of the Information herein and the trial court was without jurisdiction to authorize the filing of an Information charging the offense attempted to be charged in that Count, and

3. That the plaintiff in error was in the personal and exclusive possession of a building where intoxicating liquor was kept for sale or barter or other commercial purpose in violation of Title II of the National Prohibition Act, there was no sufficient showing of probable cause to believe the plaintiff in error guilty of the offense charged in the Fifth Count of the Information herein, and the trial court was without jurisdiction to authorize the filing of an Information charging the offense attempted to be charged in that count.

The position of plaintiff in error is that these essential elements necessary to jurisdiction to authorize the filing of an Information containing the charges contained in Counts 3, 4 and 5 of the Information herein, are not proven by the affidavits on which the trial court acted in the case at bar.

The burden was on the Government to prove that the plaintiff in error had the specific intent involved in these charges or to show facts from which it might logically be presumed.

16 C. J. 529.

We concede that criminal intent being a state of mind is rarely susceptible of direct proof and that usually it

can only be shown as an inference from facts testified to by witnesses and that the inference may within proper limits be drawn from facts legally proved.

However, it is settled law that criminal intent cannot be inferred unless such intent is reasonably deducible from the circumstances proved, that no other intent is inferable therefrom and that the circumstances proved are not consistent with the absence of criminal intent:

16 C. J. pp. 773 and 774.

These requirements as to the essential elements of proof necessary to establishing probable cause are not met by the statements contained in the affidavits filed in support of the application for leave to file the Information in this case.

It is not suggested in either of these affidavits that any intoxicating liquor had ever been sold by the plaintiff in error or anyone else in the premises mentioned in the affidavits or elsewhere. Neither is there anything in either of these affidavits showing that the premises in which the liquor and property are stated to have been found, were fitted up in any way for the sale or other commercial disposition of intoxicating liquor, nor that said premises were or ever had been a place of public resort or contained any of the things necessary to the disposition of intoxicating liquor by sale or in any other way contrary to any provision of the National Prohibition Act. Nor is it directly stated, nor can it be logically inferred from the statements contained in these affidavits that the plaintiff in error was in the personal or

exclusive control of the supposed incriminating evidence.

While on the other hand, even if it is conceded for the sake of argument that the liquor stated to have been found belonged to the plaintiff in error, which is not the fact, it is not an unreasonable inference that in this arid age he might have had it for his own personal use and without any intent to sell or barter the same or use it for any commercial purpose in violation of any provision of the National Prohibition Act. It will be observed that the quantity of liquor found is not stated in either affidavit.

Further, if it be conceded for the purpose of argument, that it appears from the affidavits under discussion that the plaintiff in error was in the personal and exclusive control of the mash and still mentioned in the affidavits, which is not the fact, it would not follow that these circumstances reasonably required the deduction that they were designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act, or that no inference other than that he intended to use them for the manufacture of intoxicating liquor intended to be used in violation of Title II of the National Prohibition Act, could reasonably be drawn therefrom, or that possession of the mash and still was not consistent with the absence of criminal intent.

It is not unreasonable to suppose that a man might be in possession of these things with the intent of using them for the manufacture of intoxicating liquor in-

tended for his own personal use. That men have, during all time, manufactured intoxicants for personal consumption is a matter within the knowledge of all men of experience, and in this day of private stills and home brew, it is just as reasonable to suppose on the circumstances shown, that the person who owned the mash and still intended to use them for the purpose of manufacturing intoxicating liquor for his own personal use as it is to infer that he intended to manufacture it for the purpose of selling it to others.

It should also be borne in mind in this connection, that all of the presumptions of law were in favor of the innocence of the plaintiff in error and that this presumption applies to the element of intent as well as to every other element essential to showing probable cause to believe him guilty of an offense under the Federal Law.

The result is that as the affidavits upon which leave to file the Information in this case, was granted, did not state facts showing probable cause for believing that the offenses charged in the third, fourth and fifth counts of the Information had been committed or that the plaintiff in error was the one who had committed those offenses, the affidavits were not sufficient to move the discretion of the court or to authorize it to grant leave to file an Information charging the plaintiff in error with the commission of the offenses charged in those counts of the Information, and the plaintiff in error was improperly arrested, called for trial and tried thereon.

Specifications of Error Four, Five and Six.

These specifications involve but a single question—The duty of the court when it appeared from the testimony of the witnesses, Rodda and Fairchild, who made the affidavits on which leave to file the Information herein was granted, while testifying for the Government that the statements contained in those affidavits were not true.

The material portions of the affidavits made by these witnesses and used by the United States Attorney in support of his application, for leave to file the Information filed herein were as follows:

"That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

"That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney being owner of premises, occupying same, and having full control of same." (R. pp. 6 and 7.)

"That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors." (R. pp. 7 and 8.)

From the testimony given by all of the witnesses tes-

tifying on behalf of the Government or otherwise, it appeared that these statements contained in the affidavits were false.

From the testimony of the witness, Bolton, it appeared that the house in which the liquor, still and mash were found, was a double house with two kitchens and that the liquor, mash and still were found in the kitchen on the east side of the house (R. p. 78); that during the time the officers were there, no one other than a lady with whom witness was unacquainted, was in the premises and that she was on the west side of the house (R. p. 79); that the witness went all through the house with the officers and that the plaintiff in error was not in the house (R. p. 80).

From the testimony of the witness, Rodda, it appeared that he went to the premises described in the information with officer Fairchild and Mr. Bolton; that the house is a large house with a hallway dividing the house into two parts; that the rooms on the east side of the hallway were fitted up for house keeping and the rooms on the west side of the hallway were also fitted up for housekeeping; that the liquor, mash and still were found in the rooms on the east side of the hallway; that it appeared that the rooms on the east side of the house were being used; that when the officers entered the building Mrs. Carney was found in the kitchen on the west side of the hallway and that the Carneys lived on that side of the building; that the plaintiff in error himself was not in the building at any time while the officers were there and that he was not arrested until the

evening of the following day; that at the time the officers were in the building, Mrs. Carney stated to them that the rooms on the east side of the building were rented to and used by a man named O'Donnell and told them where he worked and that when the plaintiff in error was arrested he stated that the rooms were rented to O'Donnell and that plaintiff in error had no control over the same and knew nothing of their contents or what was being done in them (R. p. 81 to 86).

This witness also testified that the affidavits on which the application for leave to file the Information was based, were not drawn up according to the report turned in by the officers; that at the time the officers were in the building, the plaintiff in error was not there and that the portion of the affidavit in which it is stated that the officers found the still set up and in operation and found the plaintiff in error in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors was not true. (R. p. 87.)

And as a result of the denial by this witness of the truth of the statements contained in the affidavits on which the order of the court granting leave to file the Information was based, the court permitted the United States Attorney to impeach him. (R. p. 86.)

The witness Fairchild stated that at the time the officers went to the premises involved in this case they found a lady in the kitchen on the west side of the hallway; that the liquor, mash and still were found in the rooms on the east side of the hallway; that the lady did not accompany anyone into the rooms where the

liquor, mash and still were found and that the plaintiff in error was not on the premises at the time the officers were there. (R. pp. 89 to 91.)

When the attention of this witness was particularly called to that portion of the affidavit in which it was stated that the officers found the defendant, Anthony Carney in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors, the witness stated that he did not have a chance to read the affidavit and signed it without reading it and made an effort to explain his conduct in making a false affidavit. (R. p. 90.)

From this testimony it clearly appears that the portion of the affidavits in which it is stated that the officers "then arrested Anthony Carney and brought him to Police Station" and that Anthony Carney was the owner of the premises occupying the same and "having full control of the same" and that when the officers entered the premises involved in this case, they "found therein a 12 gallon still together with the equipment used in connection with the operation of the same set up and in operation and also found Anthony Carney in charge of the said premises engaged in the operating of the said still and in the manufacture of intoxicating liquors" were false.

The contention of the plaintiff in error is that the statements contained in these affidavits not shown by the testimony of the Government's witnesses, Bolton, Rodda and Fairchild to be false, were not sufficient to justify the United States Attorney in requesting leave

to file the Information herein or to authorize the court in the exercise of judicial discretion to grant such request as a result of which it appears on the face of the record that the plaintiff in error was improperly arrested and called for trial in violation of the provisions of the Fourth and Fifth Amendment to the Constitution of the United States of America, and that upon this condition appearing, the trial court erred in not withdrawing its leave to file the Information filed herein and in failing to dismiss the action and in proceeding with the trial of the case and finally submitting it to the jury for decision.

If that portion of the affidavits above set out and stated by these witnesses to be untrue, is disregarded, there is absolutely nothing in the record which could, by any theory of logical reasoning, be held to show probable cause for belief that the plaintiff in error was guilty of any crimes charged in the Information herein or held sufficient to confer jurisdiction on the trial court to grant leave to file the Information or authorize the issuance of a warrant directing the arrest of the plaintiff in error on any of those charges or to require him to proceed to trial in the case.

When the true condition was made to appear to the court on the record the court should have secured the plaintiff in error in those rights guaranteed to him by the Constitution of the United States and should have revoked its former leave to file the Information herein and by proper order should have set aside all the subsequent proceedings:

State v. Brett, 16 Mont. 360, 364;
State v. Cain, 16 Mont. 561.

These cases were both decided by the Supreme Court of a state in which the right of the court to grant leave to file an information upon motion of a county attorney is authorized by the Constitution, granted by the statute, and confirmed by numerous decisions and the facts from which the court draws its conclusions that such leave should be granted, need not be embodied in the application therefor it being sufficient if reasons satisfactory to the court are presented, whatever may be the form or manner of their presentation and in which it is not required that a statement should be made to the court of any of the evidence upon which the state will rely for a conviction:

Section 8, Article III, Constitution of Montana;
Secs. 11798, 11617, 11624 and 11625, R. C. M. 1921;
State v. Buckovich, 61 Mont. 480, 491;
State v. Martin, 29 Mont. 273, 275;
State ex rel Donovan v. District Court, 26 Mont. 275, 279.

In the case of State v. Brett, supra, Mr. Justice Hunt, speaking for the Supreme Court of the State of Montana, in referring to the protection of the rights of a person charged with crime with reference to matters leading up to the filing of an Information, used the following language:

"Where no examination had been had before a magistrate and no commitment has been made, in

such case, to protect the rights of the defendant, and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained. Thus, again, there is the guaranty that a judicial order will be required before there can even be a charge preferred. It is suggested that obtaining of a leave of the court is a mere perfunctory matter, and is granted of course. This argument, if true, reflects credit upon the several county attorneys of the state for having administered their offices with that high sense of impartial responsibility and power imposed upon them by the constitution, but it loses its entire force if an instance should arise where a prosecuting officer oppressively, maliciously or otherwise illegally should attempt to unjustly harass any citizen by filing an information charging him with crime. At once, upon proper showing, or doubtless by order of the court of its own motion, where the court should believe that a wrong was about to be done, the leave of the court would be suspended or denied, until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until the court was satisfied by the showing made that the case was one where an information should be filed." (16 Mont. 360-364.)

In the case of State v. Cain, supra, it appeared that by leave of court first obtained, the County Attorney of

Granite County filed an Information against the defendant Cain, a member of the Board of County Commissioners, charging him with having corruptly and extorsively taken and received a warrant. After the filing of the Information, the defendant moved to set it aside because at the time the Information was filed and leave of court was asked by the County Attorney the County Attorney had made no statement to the court of the evidence or reason upon which the same was based. The motion was supported by an affidavit which was to the effect that the County Attorney, when he asked leave to file the Information, made no statement to the court and gave no information to the court which he may have had and upon which he based the information or his belief that the defendant was guilty of the offense charged, nor did the court inquire into the matter at all, nor was the court informed in any manner or at all at the time of the filing of the Information of any facts which had come to the knowledge of the County Attorney or to the knowledge of anybody and which had caused the County Attorney to file the Information against the defendant. The affidavit further stated that it appeared by the report of the Grand Jury that at the March term of said court, a grand jury had made an examination, as appears from their report, of the offices of the County Commissioners of Granite County and into the conduct of the officers of the county commissioners during the year 1893, and that said Grand Jury failed to indict the said George B. Cain for any offense whatever. It further appeared from the record that at the time the Coun-

ty Attorney asked leave to file the Information against the defendant, the report of the Grand Jury which had been made in March, preceding the filing of the Information, was on file with the Clerk of the District Court of Granite County. By this report the Grand Jury found that the defendant had illegally been paid monies for inspecting the jail and sewer. No indictment was presented. The excess of payment was the basis of the criminal charge contained in the Information subsequently filed for extortion. The court sustained the motion to dismiss the Information and ordered the defendant discharged and his bondsmen exonerated. The state duly excepted and appealed from the decision and judgment.

In affirming the judgment of the trial court in that case, Mr. Justice Hunt again speaking for the Supreme Court of the State of Montana, used the following language:

> "The affidavit of W. B. Rodgers was sufficient to have warranted the court in refusing leave to permit an information to be filed against the defendant until some showing was made by the county attorney for charging the defendant with a crime based upon the identical acts into which a grand jury had inquired, but for the doing of which they had failed to find a true bill. The fact that the information was already on file when these facts were brought to the attention of the court cannot affect the right of the court to revoke the leave already granted. If the court, in the exer-

cise of its sound judicial discretion, had a right to withhold its leave to file the information at all until inquiry could be had, under the limitations discussed in the Brett case, supra, it had a right to revoke its leave, where the defendant, directly after his arrest, and at the first opportunity presented, brought to the notice of the court the fact that his conduct had already been investigated by a grand jury, and no true bill had been found. Such was the effect of the defendant's motion. It brought to the attention of the court matters upon the presentation of which the court, in its discretion, and for apparent good cause, suspended its approval to file the information, by revoking its former leave, and setting aside the subsequent proceedings. The record discloses no request thereafter by the county attorney to file another information, and no attempt on his part to demonstrate to the court that the case was a proper one for further prosecution." (16 Mont. 563, 564.)

The principles applied in the cases last cited, finds support in theory in the decision of the United States Supreme Court in the case of Silverthorn Lumber Co. v. U. S. 251 U. S. 385, 390; 64 L. Ed. 319, 321.

In this connection we wish to state that we do not wish to be understood as suggesting that the United States Attorney intended to, or would present knowingly, to the court an affidavit which contained statements that were false, our position being, that it affirmatively appears on the record as made by the Government, that

the affidavits made by the witness Van Orden and Fairchild and presented to the court by the United States Attorney at the time he requested leave to file the information, were false, and not according to the facts, as a result of which:

The United States Attorney was misled.

The court was asked to and did exercise its discretion in granting leave to file said information and directing the issuance of a warrant for the arrest of the defendant, upon an entirely erroneous conception of the facts; and

The defendant was arrested and brought into court and required to plead to and stand trial on an information later proven by the government itself to have been improperly filed and without proper basis in law.

And that, for the protection of the public, the United States Attorney, the defendant, and itself, the court erred in not revoking its order granting leave to file the information and setting aside the subsequent proceedings.

The right to personal liberty is one of the unalienable rights of the individual:

Declaration of Independence.

This right can only be forfeited in the manner, under the conditions and after the taking in proper form of all of the steps prescribed by law:

Article 5 of the Amendment to the Constitution of the United States.

And a failure to meet these requirements cannot be

waived by the individual or lost as a result of his inaction.

Territory v. Ah Wah, 4 Mont. 149, 170, 171;
Lewis v. U. S. 146 U. S. 370; 36 L. Ed. 1011;
Hopt v. Utah, 110 U. S. 578; 28 L. Ed. 264.

No warrant can legally issue but upon probable cause supported by oath or affirmation:

Article 4 of the Amendments to the Constitution of the United States.

It cannot be that probable cause can be shown by admittedly false testimony.

Surely this court will not permit a conviction to stand when it appears on the record as it does in the case at bar that the power of the trial court was set in motion by false swearing.

The rule is that where want of jurisdiction appears on the face of the record, a judgment cannot stand:

Crawford v. Pierce, 56 Mont. 371; 185 Pac. 315;
Henderson v. Daniels, 62 Mont. 363, 377;
In re Spriggs Estate — Mont. — 216 Pac. 1108.

And there is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired, those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied:

Ex parte Lang, 85 U. S. 163, 178; 21 L. Ed. 872, 879.

Specification of Error Number 7.

The Information Is Insufficient in Law.

The argument under this specification is directed against:

1. The third count of the Information in which it is charged that the defendant "did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act," and

2. That portion of the fifth count of the Information in which it is charged that the defendant "did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place and building where intoxicating liquor was kept * * * in violation of Title II of the National Prohibition Act."

It will be observed that the fifth count of the Information also charged that the defendant "did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place and building where intoxicating liquor was * * * manufactured in violation of Title II of the National Prohibition Act" thus attempting to state two conditions under which the defendant was charged with having maintained a common nuisance, contrary to the provisions of the National Prohibition Act. However, as by their verdict finding defendant not guilty on charges contained in the first and second counts of the Information, the jury determined that the defendant was not guilty of manufacturing liquor we take it that it is not necessary to discuss the sufficiency of the fifth count of the Information in so far as it relates to the maintenance of a nuisance growing

out of a supposed manufacture of intoxicating liquors.

For the defendant having been acquitted on a charge constituting an element essential to the existence of another crime charged, to allow a conviction on the last charge, would be to allow the defendant for the same offense to be twice put in jeopardy which is contrary to established law in this country:

Fifth Amendment to the Constitution of the United States;

Ex Parte Nielson, 131 U. S. 176, 33 L. Ed. 118, 120;

Ex Parte Lange, 85 U. S. 163, 169, 21 L. Ed. 872, 876;

Ex Parte Snow, 120 U. S. 273, 281, 30 L. Ed. 658, 661;

In Ex Parte Nielson, supra, Mr. Justice Bradley, speaking for the court, said:

> "In the present case, it is true, the ground for the habeas corpus was not the invalidity of an Act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional right than an unconstitutional conviction and punishment under a valid law. In the first case, it is true that the court has no authority to take cogni-

zance of the case, but in the other, it has no authority to render judgment against the defendant. This was the case in ex parte Lange, where the court had authority to hear and determine the case, but we hold that it had no authority to give the judgment it did. It was the same in the case of Snow. The court had authority over the case, but we hold that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision securing to him a fundamental right. It is not a case of mere error in law, but a case of denying to a person the constitutional right." (131 U. S. 183-4.)

Turning now to the question as to whether or not the third count contained in the Information and that portion of the fifth count thereof relating to the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, it must be borne in mind that Title II of the National Prohibition Act was passed under the grant of power to enforce the first Section of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale and transportation of intoxicating liquors for beverage purposes, and that the mere possession of intoxicating liquor is not contrary to the provisions of either the constitutional amendment or the Act passed for the purpose of enforcing the same:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88, 65 L. Ed. 151.

This is the only reasonable conclusion that can be arrived at from a reading of the statute itself.

Section 3 of Title II provides that:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States, goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this Act."

This exception clearly implies that there are exceptions to the general provisions of the Statute.

Section 29 reads as follows:

> "Any person who manufactures or sells liquor *in violation of this title* shall have a first offense by fine," etc.

Here the clear implication is that liquor may be possessed or kept without violating any of the provisions of Title II of the National Prohibition Act.

By Section 33 of the National Prohibition Act, it is provided that:

> "It shall not be unlawful to possess intoxicating liquors in one's private dwelling while the same is used and occupied by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and his bona fide guests while entertained by him therein."

Here is a condition under which the statute specifically permits the possession of intoxicating liquor with-

out there being a violation of any law relating to the manufacture or sale of intoxicants, and possession of liquor away from the place in which the owner actually dwells or actual, physical control of intoxicating liquor belonging to another is not necessarily unlawful:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88; 65 L. Ed. 151.

So it is apparent that in a prosecution for a violation of the National Prohibition Act growing out of the possession of intoxicating liquor or the maintenance of a common nuisance as a result of the keeping of intoxicating liquor, it is essential to proper pleading that the existence of the condition under which intoxicating liquor may lawfully be kept must be negatived or the absence of the negative averments in pleading must be supplied by the pleader.

This condition is recognized and met by Section 32 of the National Prohibition Act which provides as follows:

> "It shall not be necessary in any affidavit, information, or indictment, to give the name of the purchaser, or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

Here we find an implied recognition of the rule that the pleading should include averment showing that the case in which the charge is made does not fall within the provisions of the statute bringing the matter within the exceptions provided by the law itself, and a permission

to cure the defect growing out of their absence by charging in the pleading "that the act complained of was then and there prohibited and unlawful."

The pleader has a choice of methods, but the pleading must of necessity meet one or the other of the requirements of the statute or it is insufficient in law:

> Enterprise Sheet Metal Works v. Schendel, 55 Mont. 42, 50-51.

In the case last cited, in determining the sufficiency of a complaint in a civil action under a statute permitting the pleading of certain words instead of the statement of other matters otherwise essential to the statement of a cause of action, Mr. Chief Justice Brantley, speaking for the Supreme Court of the state of Montana, used the following language:

> "True, the statute (Rev. Codes Sec. 6572) permits a party declaring upon a contract containing conditions precedent, to allege generally that he has performed all the conditions on his part. In order to avail himself of this permissive provision, however, the pleader must couch his allegation in the terms of the statute or in terms substantially equivalent." (55 Mont. pp. 50-51.)

In the pleading in the case at bar, the Government has failed to include any defensive negative averments or to state "that the act complained of was then and there prohibited and unlawful," as a result of which, we submit the pleading is insufficient in so far as the third count and that portion of the fifth count in which it is charged that the defendant maintained a nuisance,

"that is to say, a place and building where intoxicating liquor was kept," is concerned.

U. S. v. Cleveland, 281 Fed. 249;

Specifications of Error Numbers 8 and 9.

These specifications relate to the admission in evidence over the objection of the plaintiff in error of statements made and transactions had in his absence and without his hearing.

During the examination of the witness Bolton, the following proceedings were had:

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said I would like to inspect your gas meter—

MR. BALDWIN. Objected to as incompetent, irrelevant, immaterial and hearsay.

THE COURT: Overruled.

By MR. BALDWIN: We will ask a general objection and exception on the same grounds of all testimony to be given concerning statements made and transactions had in the absence of the defendant.

THE COURT: It will be noted.

A. The lady said, "You can't get in now, wait a minute;" so I waited about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

Q. Is he one of the police officers of the city of Butte?

A. Yes, sir; and I told him I thought—

Q. You don't need to tell what you told him. Now you say you waited for about twenty minutes after the lady told you to wait?

A. Yes, sir.

Q. Did you then leave the house?

A. Yes, sir.

Q. Did you subsequently return there the same day?

A. Yes, sir.

Q. About how long after that?

A. About half an hour.

Q. Who, if anyone, accompanied you to this home?

A. Mr. Rodda and Mr. Fairchild of the police station. (R. pp. 77 and 78.)

And thereafter this witness testified concerning what was found in the house by the officers and everything that was done while they were there, and in the course of his testimony, stated that he did not see the plaintiff in error that day; that he went all through the house with the officers and that the plaintiff in error was not present at that time or place. (R. p. 80.)

The witness, Rodda, next testifying on behalf of the Government, was allowed to testify over the general objection and exception as follows:

Q. As such officer did you on or about the middle or the 18th of April last year go to a house at 205 West Quartz Street in the City of Butte?

A. Yes, sir.

Q. Who accompanied you?

A. Officer Fairchild and Mr. Bolton.

Q. The gentlemen who just testified?

A. Yes, sir.

Q. Was it by virtue of a certain report which he made to you or Mr. Fairchild you went to this house?

A. Yes, sir.

Q. Do you know who was living in that house at that time?

A. Mrs. Carney said she owned—Mrs. Carney says she owns the property her and her husband. (R. p. 81.)

Later when recalled by the Government, this witness testified over the general objection of the plaintiff in error and the further objection that the testimony offered was unnecessary repetition and not proper rebuttal, as follows:

Q. Mr. Rodda, when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed?

A. The door was closed.

Q. What did you do?

A. Knocked at the door.

Q. Who came to the door?

A. Mrs. Carney.

Q. Is that the first place in or about the house you saw her?

A. Yes, sir.

MR. BALDWIN: Objected to as unnecessary repetition and not proper rebuttal.

Q. Let me ask you what, if anything, did she say to

you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said have you got a search-warrant and I said no, lady, we got a still.

Q. Was she present to see you take the still?

A. Yes, sir.

Q. How close did she stand?

A. Right close by me; probable two feet away.

Q. Did she make any explanation to you about the presence of the still or mash or moonshine in the house?

A. No, sir.

Q. She didn't say anything about any man by the name of O'Donnell?

A. After a while she did.

Q. Was that before or after she asked if you had a search warrant?

A. After. (R. p. 123-4.)

The testimony given by these witnesses concerning transactions had and conduct of and statements made by the wife of the plaintiff in error was forcibly called to the attention of the jury by the court in its charge.

While charging the jury, the court used the following language:

"Now, Gentlemen, as to evidence. The meter man goes there and asks to be admitted as he has a right to; he is met with an objection at the door and the reason for which he didn't know; you have heard the wife's statement as to why she didn't allow him; he says he

stood there twenty minutes, she didn't say how long; he went away and he reports to the officers; what he reports we are not interested in, but at any rate all go back together, and here comes the first contradiction between the officers and the wife; Rodda says he knocked and in a minute the witness came to the door. She testifies she sat in the kitchen with the baby and saw nobody or heard nobody until the officers came in the kitchen. Rodda says the officers looked through the door into this east side kitchen nearly opposite to the west side of the kitchen, was standing half open or ajar to some extent and Rodda pushes it open and finds the still, intoxicating liquor, moonshine and mash which Rodda says was fermenting and ready to be distilled. * * * * * While taking it out apparently nothing was said by his wife, no excitement so far as the evidence shows, didn't say anything, made no objections. But after getting it out she begins to ask about a search-warrant. She first testified she didn't and afterwards she said she didn't remember. The officers said she did. If defendant and his wife were not concerned why wouldn't she be anxious to have it carried out instead of inquiring for a search warrant? At that time after removing it had taken some little time, she first began to make an explanation and began to account for it by a man named O'Donnell who rented the rooms. (R. pp. 130-1.)

Plaintiff in error contends that the admission of this evidence was error which affected his substantial rights.

It violates the first principle in the law of evidence to

allow a party to be affected either in his person or property by the declaration of a witness made in his absence or not under oath:

10 R. C. L. p. 960;

Connors v. People, 18 Colorado, 383; 33 Pac. 159, 161.

In the case last cited, the court used the following language:

> "The witnesses Farley and Newcone were permitted over objections to testify to statements made to them by the witness Halladnot made in the presence of the plaintiffs in error or either of them. This was hearsay evidence and clearly inadmissible * * * * The admission of this testimony was so clearly violative of every rule of evidence that in itself it would compel a reversal of the case and it becomes unnecessary to notice the further objections so fully argued by counsel. For the reasons given, the judgment will be reversed." (33 Pac. 161-2.)

This rule applies to the statements of a wife even in civil cases and the fact that a party to a suit is the husband or wife of another person does not render the acts, admission or declarations of the latter admissible against the former. When offered in a suit by a third person against either husband or wife, declarations of the other spouse will be rejected unless the statements are shown to be admissible within some one of the rules applicable to parties generally, as for example, the rule permitting proof of declarations of agents, or that re-

lating to admission by acts, conduct or silence, or because the wife claims under and through the husband. To render the declarations of either admissible against the other on the ground of agency, it must be shown that the statements were within the scope of the declarants of authority:

1 R. C. L. p. 515, Sec. 56.

There is nothing in the evidence tending to show that the wife of the plaintiff in error was his agent or authorized by him in any way to do or say any of the things she did or said.

So even if the case were a civil case, the admission of the testimony relating to statements and conduct of the wife of the plaintiff in error in his absence would have been error.

There is another reason why the court erred in admitting the testimony admitted over the objection of plaintiff in error.

It was a well known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule and this rule has not been changed by any statute of the United States in so far as cases such as the case at bar are concerned as a necessary corallary of which testimony concerning the conduct of the wife of a party accused of crime or statements made by her in his absence or without his hearing cannot properly be admitted against him:

Johnson v. U. S. 221 Fed. 250, 251;

Bassett v. U. S. 137 U. S. 503; 34 L. Ed. 762, 763-4;

Humphreys v. State — Miss. — 84 So. 141, 142-3.

Wharton's Criminal Evidence, p. 992, Sec. 480.

In the last case cited, the defendant was convicted of stealing cotton. The record discloses that a constable and deputy sheriff who arrested him, were permitted over the defendant's objection to state the following circumstances; that he went to the defendant's home about 9 or 10 o'clock on Saturday morning and placed defendant under arrest; that at the time the defendant stated that he had not eaten breakfast and there was apparently some delay in leaving the house on that account; that the officer suggested to the defendant's wife that he desired to search the house on account of cotton stealing; that the wife told him all right, and proceeded to pull up a mattress and exhibit a very large and long cotton sack, and thereupon stated to the officer that this was the cotton sack which her husband used in bringing or conveying the cotton from the field to the house. Appellant was then carried to jail and incarcerated. On Sunday morning, while the defendant was in jail, the officers returned to the premises where the cotton was grown and made an original investigation about the tracks, and also applied at the defendant's house for the cotton sack, and on doing so found that the sack had been cut up into strips. * * * * In detailing the conversation and statements of the wife, when the defendant

was first placed under arrest, the officer did not make it positive that the defendant actually heard what the wife had to say or that he was called upon either to affirm or deny her statement that the long cotton sack was the one employed in transporting cotton from the field to the cotton pen * * * *

While considering the admission of this testimony the court said:

While the testimony, if believed, is sufficient to support a verdict of guilty, the record nevertheless presents a close case on the facts. It is therefore not only of great concern to the accused in this case, but of great importance to an absolutely fair administration of justice, that no error should be committed by the trial court in the exclusion or admission of testimony * * * *.

We shall limit discussion to and decide but a single point. In as much as the state's case is made and upheld by circumstantial evidence, it is no stronger than the weakest link in the chain of testimony. It is, as suggested, very important that the minds of the jurors should not be unduly influenced by incompetent testimony. It is not clear from the testimony that appellant heard the full conversation between the officer and appellant's wife at the time the house was first searched and defendant arrested. It does not appear why or upon what charge or under what authority the arrest was made. Inferentially it appears that the arrest was based upon some other charge or at least upon a mere suspicion of the officer that appellant had something to do with this cotton stealing. It affirmatively appears

that appellant had not at that time been charged with the crime and a full investigation even by the officer had not then been made.

Under these circumstances the officer was permitted to testify that the wife exhibited an extra large cotton sack and admitted that this particular sack was used by them in transporting cotton from the field. He was also permitted to testify that while the defendant was in jail at Holly Springs, he went back to the home in search of this sack and found that it had been destroyed. Certainly the defendant did not destroy it, and inferentially it appeared that the wife destroyed the sack and upon the theory that it furnished evidence of the defendant's guilt. Naturally it would be taken by the jury as an overt act by the wife in recognition of the defendant's guilt. Now, it must be conceded that the state could not place the wife upon the witness stand, and thereby prove by her directly what was indirectly shown through the officer. This incompetent evidence as a whole, operated as a confession by the wife of her husband's guilt. On a close case of the kind under review it very probably had influence with the jury and operated to the defendant's prejudice. We think it is sufficiently damaging to upset the verdict and justify a new trial.

We shall neither discuss nor decide the other points argued.

Reversed and remanded. (84 So. 142-3.)

So in the case at bar, the wife of the plaintiff in error would not have been permitted to go upon the stand and

testify that her husband actually owned the intoxicating liquor, mash or still or that he had any connection with the same or had manufactured or sold any intoxicating liquor and it was clearly error for the court to admit testimony concerning statements made by her and her conduct during the absence of the plaintiff in error on the theory that by inference it might be found therefrom that the plaintiff in error was the owner of the liquor, mash or still or had participated in the manufacture or sale of intoxicating liquor.

Specification of Error Number 10.

This specification is based upon the Order of the Court denying the Motion of plaintiff in error for a directed verdict made at the close of the Government's case: (R. p. 91.)

At the close of the evidence in every trial by jury, the question of law, not whether the weight of the evidence sustained the claims of the plaintiff or defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff necessarily and unavoidably arises and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence.

It is certain that evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction and that at the close of every trial by jury, it is the duty of the court upon request, to consider and determine whether or not there is any substantial evidence of the guilt of the accused and if there is none, to instruct the jury to return a verdict for the defend-

ant. If there is at the close of the trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt:

Isbell v. U. S. 227 Fed. 788, 792;

Norowitz v. U. S. 282, Fed. 575, 578.

Or as the rule is otherwise stated, there is a legal presumption that the party accused is innocent until he is proven to be guilty beyond a reasonable doubt. The burden is upon the Government to make this proof and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction:

Union Pacific Coal Co. v. U. S. 173 Fed. 737, 740.

For the defendant in a criminal case may not be convicted on conjecture however shrewd, on suspicion, however justified, on probability, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt; that is upon proof such as to logically compel the conviction that the charge is true:

State v. Riggs, 61 Mont. 25, 51;

Mickle v. U. S. 157 Fed. 229.

The question then is—Does the record in this case contain substantial evidence of facts which exclude every

reasonable hypothesis but that of guilt?

Our contention is that it does not.

Presumption of Innocence.

In the investigation and estimate of criminatory evidence, there is an antecedent prima facie presumption in favor of the innocence of the accused grounded in reason and justice not less than in humanity and recognized in the judicial practice of all civilized nations, which presumption must prevail until it is destroyed by such an overwhelming amount of legal evidence of guilt as is calculated to produce the opposite result. This presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. The fact that the presumption of innocence is recognized as a presumption of law is characterized by the civilians as a presumptio juris, demonstrates that it is evidence in favor of the accused, for in all systems of law, presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy:

Coffin v. U. S. 156 U. S. 431; 39 L. Ed. 481, 493.

And where circumstantial evidence alone is relied upon, as it is in this case, to overcome this presumption of innocence, the criminatory circumstances proved must be consistent with each other and point so clearly to the

guilt of the accused as to be inconsistent with any other rational hypothesis.

State v. Ducolon, 60 Mont. 594, 597; 201 Pac. 267, 268;

McLaughlin v. State, Okla. Cr. Ap., 193 Pac. 1010;

Gardner v. State, Wyoming, 196 Pac. 750;

Scoggins v. U. S. (CCA 8 Cir) 255 Fed. 829; 3 A. L. R. 1093;

Union Pacific Co. v. U. S. 173 Fed. 729, 740;

Goff v. U. S. 250, Fed. 295-6;

Wharton's Criminal Evidence, pp. 1643-4.

As stated by the learned author last cited, circumstantial evidence is limited by or rather should be justified by the following rules which while they may be differently phrased, are fundamental rules in all jurisdictions:

1. It should be acted upon with caution.

2. All the essential facts must be consistent with the hypothesis of guilt as that is compared with all the facts proved.

3. The facts must exclude every other reasonable theory but that of guilt.

4. The facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

And for the purpose of proving the identity of the accused as the person who committed the crime, it is essential that the circumstances proved constitute an un-

broken chain which leads to but one fair and reasonable conclusion and which points to the defendant to the exclusion of all others as the person guilty.

16 C. J. 774.

When these rules are applied to the record in this case, the facts proven, fail to satisfy the legal requirements.

Three witnesses were called and testified on the part of the Government and taking all of the testimony given by each of them as true, and drawing from it those inferences which might properly be drawn, the evidence fails to show criminatory circumstances consistent with each other and pointing so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis or which points to the defendant to the exclusion of all others as the guilty person.

From the testimony of the witness Fred Bolton, it appears that on the 18th day of April, last year, he went "to a residence at 205 West Quartz Street, in the City of Butte," and tried to gain entrance for the purpose of inspecting a gas meter contained therein; that a lady said "You can't get in now, wait a minute," and that he waited for about twenty minutes as he guessed, and nobody came back, whereupon he left, and later and on the same day, returned with officers Rodda and Fairchild; that Mr. Rodda went to the front door and Mr. Fairchild and the witness went to the back door; that he don't know what took place at the front door but that officer Rodda let he and Fairchild into the building and that later, while there, he saw "in that house a still;" that the house is "a double house" and that there were

two kitchens in the house and the still was found in the kitchen on the east side of the house; that the lady who had spoken to him and who he saw in the house was "in the other side of the house;" that beside the still he saw a fifty gallon barrel of corn mash which had an odor and that "a small bottle" of whiskey was found in the house; that he did not see the defendant on the premises at any time while he was there.

Officer Rodda testified that he went "to a house at 205 West Quartz Street, in the City of Butte "with officer Fairchild and Mr. Bolton, on April 18, 1922; that he got into the house "in over a minute" after the first knock, and told Mrs. Carney that he was a police officer. In describing the house he said "It is a large building with hallway going back between the center of the rooms at the right and also on the left; that the still was found in the kitchen on the east side of the building and that "Mrs. Carney was in the west side of the building in the kitchen;" that the defendant was not around there at the time; that when Mrs. Carney opened the front door, an odor attracted his attention; that Mrs. Carney accompanied him to the kitchen where the still was and entered after he opened the door; that she did not say anything until after the still and mash had been found, when she said: "Have you got a search warrant?" That she told the officer that a man named O'Donnell was renting the premises where the still was found and told him where O'Donnell worked and said that she did not know anything about the still, moonshine or mash. The officer also testified that he found

a fifty gallon barrel of mash and about ten gallons in another barrel, a beer keg; that the mash was corn and in a state of fermentation and that he found pretty near one-half gallon of moonshine whiskey in the east side of the house; that the still, mash and whiskey were taken from the house; that he wanted to pour the mash down the sewer but that Mrs. Carney objected because she was afraid that the sewer would be stopped up and that he threw the mash in the back yard. From his testimony it appears that he arrested the defendant Carney the next day at the place mentioned in the Information. The officer testified that in the room where the still was there was a stove, kitchen utensils, a chair or two and that "it appears the premises were being used;" that in the other room he found a bed and he was not questioned further concerning the contents of any of the rooms. He also testified that at the time the defendant was arrested, he was returning home from work and stated that another man had been renting the rooms on the east side of the building.

During the course of the examination of this witness the following took place:

Q. What if anything did the defendant say the next day when you found him?

A. Mr. Carney?

Q. Yes?

A. He said another man had the renting of them rooms, rented them from him.

Q. He said another man had been renting the rooms?

A. Yes, sir.

Q. If the court please I find I am taken by surprise in this action by his testimony.

THE COURT: You may show if he made contradictory statements.

Q. You signed an affidavit did you not Mr. Rodda, that while engaged in the duties of your——

MR. BALDWIN: We ask the affidavit be shown to him.

Q. You saw the affidavit?

A. There are lots of affidavits we sign when we are in a hurry and have to get out. This is not right, Mr. Carney wasn't there.

Q. You signed that affidavit?

A. Yes, sir.

Q. In that affidavit you stated that while engaged in the discharge of your official duties you were at the premises situated at 205 West Quartz Street, and found there a twelve gallon still together with equipment used in connection with the same set up and in operation and also found Anthony Carney in said premises and manufacturing intoxicating liquor. That's what you said in the affidavit?

A. There is a mistake in it, whoever wrote it up, yes sir.

So, on the record, this witness was impeached and discredited by the Government itself. The same condition exists with reference to the witness Fairchild who testified on behalf of the Government.

The witness Fairchild stated that on April 18, he went with Mr. Bolton and officer Rodda to a building at 205

West Quartz Street; that they found one-half gallon of moonshine whiskey and sixty gallons of mash, a still "in the kitchen on the east side of the house;" that he did not see any person in the room where these things were found besides the two officers; that he saw a lady there "but she was on the west side" and that the lady did not accompany him or anybody else into the room where the whiskey was found; that the defendant was not there at the time; that the officers found the still and whiskey in the kitchen and in the next room to it, found a bed and about sixty gallons of mash at the foot of the bed, and while under examination by the court, testified as follows:

Q. What else was on the east side of the house besides what you found?

A. We found the still and whiskey in the kitchen, in the next room we found a bed sitting in that room and about sixty gallons of mash at the foot of the bed, a fifty gallon barrel and a ten gallon keg. That was all I saw there.

Q. Any clothing or anything?

A. No, sir. Nothing more than bed clothing.

Q. Any tables, dishes, anything else?

A. No sir.

Q. Did you see anyone's shoes or hats or anything?

A. No sir, I don't think I did.

Q. How many rooms on that east side?

A. I think there are three rooms on that side, I don't know. I could not say.

This is the only testimony given by this officer con-

cerning the contents of the rooms on the east side of the building and no testimony on that matter was given by the witness Bolton.

With reference to the contents of the rooms on the east side of the building, officer Rodda testified as follows:

Q. In the room where the still was, what was there besides the still, mash and whiskey?

A. There was a stove.

Q. Kitchen utensils?

A. Yes sir and a chair or two.

Q. Did it appear to be a kitchen used by somebody for cooking?

A. It appeared the premises were being used.

Q. Did you go into any other room on that side of the house?

A. Yes sir.

Q. Did you find anybody living there?

A. No one was there when we went there.

Q. Did you find the rooms filled with furniture or fixtures?

A. Yes sir, a bed in there.

So, it seems that the witness Rodda saw things in the premises of a useful character that were not observed by the witness Fairchild and it is not unreasonable to infer that there were many things of a nature useful in keeping house and actually living, which they did not observe or recall observing for the reasons that their attention was directed to the things they sought and they had no occasion to look for things which might

reasonably be expected to be found in the quarters used for living purposes.

In addition to having admitted that they had mistakenly made statements of facts under oath in the form of an affidavit, which were directly opposed to the testimony they gave when under oath, when testifying as a witness in the trial of this case, these witnesses contradicted each other flatly on the question as to whether Mrs. Carney did or did not go into the kitchen on the east side of the building where the still was found and as a result, it may be and reasonably is to be inferred that officer Rodda was probably mistaken concerning the details as to what occurred during the time the officers were in the premises and just what Mrs. Carney said and when she said it, if at all. At any rate the Government rested its case on the testimony of two witnesses who according to their own admsision while testifying had made false statements under oath in the affidavits used by the Government to put the machinery of the court in motion and who were impeached by the Government itself during the course of their examination in chief by the United States Attorney and one other witness whose testimony failed to connect the plaintiff in error with the premises or anything in them.

Indeed there was no testimony offered by any of the Government's witnesses connecting the plaintiff in error in any way with the building in which the liquor, mash and still were found or anything in it other than the testimony of the witness Rodda, who stated that Mrs. Carney stated to him that she and her husband owned

the building (R. p. 81). And later testified that during the same conversation, Mrs. Carney stated to him that the part of the building in which the liquor, mash and still were found were rented to a man named O'Donnell (R. p. 124).

This testimony clearly fails to prove as the law requires, that any of the offenses charged in the Information had been committed by anyone or that the defendant was in any way a party to or interested in or had any knowledge concerning the commission of any of the crimes charged.

The burden is on the Government to establish the guilt of the accused; that is to prove every fact and circumstance which is essential to the guilt of the accused or as frequently stated, to prove every essential element of the crime charged including the criminal intent, and to prove each item as though the whole issue rested on it:

16 C. J. 528-9;

Fraser v. U. S. — Okla. — 103 Pac. 373, 374.

And the prosecution has the burden of proving that a crime has been committed before the jury proceed to inquire as to who committed it. For the proof of a charge in criminal causes involves the proof of two distinct propositions; first, that the criminal act itself was done and secondly, that it was done by the person charged and by none other; in other words, proof of the corpus delicti and of the identity of the prisoner:

16 C. J. 529;

Sanders v. State — Ala. — 52 So. 417; 28 L. R. A. N. S. 536, 538;

Goff v. U. S. 257 Fed. 294, 295;

Gardiner v. State — Wyo. — 196 Pac. 750; 15 A. L. R. 1040, 1046.

While the identity of the accused as the person who committed the crime and the criminal intent necessary to the conviction of crime may be established by circumstantial evidence, such evidence cannot establish:

1. The identity of the accused unless the circumstances proved constitute an unbroken chain which leads to but one fair and reasonable conclusion and which points to the defendant, to the exclusion of all others, as the guilty person; and

16 C. J. 774.

2. The criminal intent unless such intent is reasonably deducible from all the circumstances proved; that no other intent is inferable therefrom and that the circumstances proved are not consistent with the absence of criminal intent:

16 C. J. 773.

With this statement of the evidence and the legal principles controlling in the matter now under discussion, we will proceed to a discussion of the several crimes charged in the Information on which the plaintiff in error has been convicted.

Third Count.

The charge contained in this Count of the Information is that at a time and place therein specified, the plaintiff in error did wrongfully and unlawfully have

and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act. (R. pp. 3 and 4.)

This charge is based upon Section 25 of the National Prohibition Act:

41 Stat. at L. p. 315;

2 Fed. Stat. Ann. p. 213.

which so far as it is material here is as follows:

"It shall be unlawful to possess any liquor * * * intended for use in violation of this title * * * *."

Since here, as always, the purpose of Congress in enacting a law is of importance in determining the meaning of it. It is noteworthy that Title II of the National Prohibition Act was passed under the power to enforce the first section of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale and transportation of intoxicating liquors for beverage purposes only and that it is not unlawful to have or possess intoxicating liquor, the unlawfulness declared by Section 25 of the National Prohibition Act being conditioned upon the intended use of liquor in violation of the provisions of that Act:

Eighteenth Amendment to the Constitution of the United States; Fed. Stat. Ann. 1919 Sup. p. 839;

Street v. Lincoln Safe Deposit Co. 254 U. S. 88, 91-2; 65 L. Ed. 151, 153.

So the real question involved under this charge is not whether the plaintiff in error in fact had or possessed intoxicating liquor, but whether he had or possessed in-

toxicating liquor with intent to sell, barter or dispose of it in some other commercial way.

Nowhere in the Government's case does it appear that the plaintiff in error ever was the owner of, in the possession of or in the control of, or that he had any knowledge concerning the existence of the liquor stated to have been found by the officers.

So we submit that so far as he is concerned, there is no direct evidence of any kind proving the facts necessary for the Government to prove prior to the entry by the court and jury upon the consideration of the question as to the intent with which the one really having or possessing the liquor had or possessed the same. Nor is there anything in the record tending to show anything from which it might reasonably be inferred that the person having or possessing the liquor stated to have been found by the officers intended to sell, barter or otherwise dispose of the same.

There is nothing in the record tending to show that intoxicating liquor had ever been sold on the premises or that the premises were used for any purpose other than for the purpose of dwelling or that anyone other than those dwelling in the premises ever went into the same or that anyone showing the least sign of intoxication had ever been observed in or near the premises in which the liquor was stated to have been found, or that bottles or glasses such as are ordinarily used in the traffic or sale of intoxicating liquor were found upon the premises, or that the premises had the general reputation of being a place where intoxicating liquors were sold.

So we submit that on the record there is nothing from which it might be inferred reasonably that the plaintiff in error had or possessed the intoxicating liquor stated to have been found by the officers or that it was intended by anyone for use in violation of any of the provisions of the National Prohibition Act.

Evidence much stronger has repeatedly been held to be insufficient to justify a conviction.

In State v. Jones, 211 Pac. 1075, the Criminal Court of Appeals of Oklahoma held that proof that a quantity of liquor was in a public place on a single occasion was not sufficient to sustain a conviction.

In State v. Jenkins, 213 Pac., the Supreme Court of Montana held that proof of a single sale of intoxicating liquor was not sufficient to justify a conviction on the charge of maintaining a nuisance.

In Munsey v. U. S. 289 Fed. 280, 282, it was held that the sale of a bottle of whiskey on a single occasion was not sufficient to justify a conviction on a nuisance charge.

In Scoggins v. U. S. 255, Fed. 825; 3 A. L. R. 1093, it was held that proof that the defendant received whiskey in packages regularly up to November, 1915; that in that month he received two packages, one marked 24 pints consigned to Jack McGee and the other consigned to J. Burke; that these packages were delivered in an old out house and that prior to the delivery of these packages, the defendant had received other packages of like character consigned to himself and that in November, 1915, a witness called by the Government took a

bottle of whiskey from the defendant's pocket and promised to pay him therefor the next day, was not sufficient to justify a conviction of selling intoxicating liquor.

We are aware that this court has held that a single sale of intoxicating liquor is sufficient to justify a conviction on a nuisance charge. However, so far as we are informed, it has never been held that a single sale of intoxicating liquor will justify a conviction unless the place in which the sale is made is a place fitted up for the sale of liquors to which the public resorts and where the surrounding circumstances proven, were such that it appeared on the record that the sale was one of the ordinary recurring transactions in the business usually carried on at the place involved.

No such showing was made here and cases of the kind last referred to are not authority for a position opposed to the position contended for by the plaintiff in error in this case.

For in the case at bar the conviction is based solely upon inference drawn from evidence which is not sufficient in law to support them.

An inference is a deduction which the reasoning of the jury makes from facts proved without an express direction of law to that effect.

Any inference which the jury are justified in acting upon as affecting the issues before them must be a reasonable deduction from the evidence, and the inference drawn should be clear and strong, the natural and logical result of an open and visible connection between the principal and the evidentiary facts. A verdict based

upon an inference drawn from another inference is based upon mere speculation and therefore not warranted by the evidence.

3 Encl. of Ev. p. 65-68;
16 C. J. p. 534;
G. N. Ry. Co. v. Johnson, 176 Fed. 328;
M. K. & T. Ry. Co. v. Foreman, 174 Fed. 377, 383;
U. S. v. American Surety Co. 161 Fed. 149, 151-2;
U. S. v. Ross, 92 U. S. 281-283, 23 L. Ed. 707, 708;
Manning v. Mutual Life Ins. Co. 100 U. S. 675, 697, 25 L. Ed. 761, 763.

In the case of U. S. v. Ross, supra, the court used the following language:

> "It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards at some unknown time (whether before or after Aug. 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed

to have reached Chattanooga, thus arrived and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences. * * A presumption which the jury is to make is not a circumstance in proof; and it is not,

therefore, a legitimate foundation for a presumption." (23 L. Ed. p. 708.)

Before a conviction on the Third Count contained in the Information in the case at bar could legally be had, the burden was upon the Government to prove that the plaintiff in error had and possessed the intoxicating liquor mentioned therein and that he intended to use it in violation of Title II of the National Prohibition Act.

To arrive at the conclusion it did arrive at, the jury must have inferred from the fact that the witness Rodda testified that Mrs. Carney stated that she and the plaintiff in error were the owners of the building in which the liquor was stated to have been found, that the liquor was had and possessed by the plaintiff in error and as an inference therefrom that the plaintiff in error intended to use the liquor in violation of the National Prohibition Act.

Both of these inferences are based upon mere conjecture and neither one of them has any sound basis in the proof offered by the Government in this case.

It is clear that to allow the conviction on that count of the Information to stand, would be to allow a verdict based on an inference drawn from another inference; in other words based upon mere conjecture, to stand, which is unthinkable.

Fourth Count.

In the Fourth Count of the Information it is charged that at the same time and place, the plaintiff in error did have and possess property designed for the manufacture of intoxicating liquor intended for use in violation

of Title II of the National Prohibition Act.

This charge is also based upon Section 25 of the National Prohibition Act, which in so far as it is material here is as follows:

"It shall be unlawful to have or possess * * * property designed for the manufacture of liquor intended for use in violating this Title."

So it is incumbent upon the Government to prove that the plaintiff in error had or possessed property adapted for the manufacture of intoxicating liquor and that he intended to use liquor manufactured with it in violation of some provisions of the National Prohibition Act.

On the evidence outlined above the Government wholly failed to sustain this burden.

There is no direct evidence tending to show that the plaintiff in error owned, had, possessed or controlled or had any knowledge concerning any property designed for the manufacture of intoxicating liquor. The only proof that the Government offered which could in any way connect the plaintiff in error with even the building in which the property was found or with any of the illicit property contained therein, was the testimony of the witness, Rodda, who stated that Mrs. Carney, the wife of the plaintiff in error, said that she and her husband owned the building in which the property was found.

It does not appear from the evidence when the illicit property went into the building, by whom it was put

there or that it had ever been used for any purpose at all.

To allow the conviction on this count of the Information to stand would be to sustain a verdict based upon an inference growing out of another inference. In other words, to allow the jury to infer from the statement as to the ownership of the building that the plaintiff in error was the owner of the property said to be designed for the manufacture of intoxicating liquor and from such ownership to infer that he intended to use the same for the purpose of manufacturing intoxicating liquor and that he also intended to use the intoxicating liquor intended to be manufactured in violation of some provision of the National Prohibition Act.

To allow the verdict to stand would be to allow the plaintiff in error to be punished under a verdict based upon mere speculation which under the authorities heretofore cited is contrary to right and law.

Fifth Count.

In the Fifth Count of the Information it is charged that at the same time and place the plaintiff in error did unlawfully maintain a common nuisance; that is to say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act.

This charge is based upon Section 21 of the National Prohibition Act which so far as is material here provides that any room, house, structure, or place where intoxicating liquor is manufactured or kept in violation of this Title is hereby declared to be a common nuisance

and any person who maintains such a common nuisance shall be guilty of a misdemeanor.

It will be observed that in this Count it is charged that the plaintiff in error maintained a common nuisance in two ways: by keeping intoxicating liquor in violation of Title II of the National Prohibition Act and manufacturing intoxicating liquor in violation thereof.

However, by their verdict of not guilty on the first and second counts contained in the Information herein, the jury of necessity found that the charge contained in the Fifth Count of the Information in so far as it relates to the manufacture of liquor was untrue, and as a result further contention concerning that portion of the charge contanied in the Fifth Count of the Information is foreclosed.

We submit that there was no substantial evidence in the record tending to show that the plaintiff in error kept any liquor on the premises for any purpose.

There is nothing in the record tending to show that the intoxicating liquor stated to have been found in the building belonged to the plaintiff in error or that he had any control over or knowledge concerning the same.

It does not appear from the evidence when, or by whom the intoxicating liquor said to have been found in the building was taken there.

It does not appear from the testimony that any intoxicating liquor had ever been used or disposed of in the building or that the quantity of intoxicating liquor originally taken into the building had in any wise diminished.

While it does appear from the testimony of the witnesses for the Government that the plaintiff in error was not the only person who had access to the premises or who could have put the liquor where it was said to have been found, from which it follows that on the facts proved, it cannot be said with any reasonable degree of certainty that the plaintiff in error kept the liquor in the place where it is said to have been found, and on the facts and law above outlined, we submit that even if it be conceded for the sake of the argument that the plaintiff in error owned the liquor stated to have been found, there is no substantial evidence in the case upon which a verdict finding that he kept the same for the purpose of sale, barter or other commerical use, could be based.

While on the record made by the Government itself, it appears that the conditions were such that if the plaintiff in error was in the personal and exclusive control of the portion of the building in which the intoxicating liquor is stated to have been found, he would have had a legal right to keep and possess it there.

From all of the testimony offered for the Government, it appears that the house at 205 West Quartz Street, in the city of Butte, in which the liquor is stated to have been found, was used as a private dwelling and it is not unlawful to possess liquors in one's private dwelling while the same is occupied and used by the possessor as his dwelling only and such liquor need not be reported:

Sec. 33, National Prohibition Act:

Street v. Lincoln Safe Deposit Co. 254 U. S. 88;

65 L. Ed. 151, 153.

So the Government is caught between the horns of a dilemma.

If it is conceded that the house in which the intoxicating liquor is stated to have been found was the residence of the plaintiff in error as the Government seems to contend it was, no violation of the National Prohibition Act was shown. If on the other hand, the Government concedes that the statement made by Mrs. Carney to the effect that the portion of the building in which the intoxicating liquor is stated to have been found, had been rented to and was in the exclusive possession of one O'Donnell, the proof of guilt so far as the plaintiff in error is concerned absolutely fails.

There Is Nothingg in The Record Tending to Show That The Plaintiff In Error Had Any Knowledge Or Reason to Suspect The Use to Which the Portion of The Building On the East Side of the Hallway Was Put.

There was nothing in the evidence other than an odor stated by the officers to have been noticed by them as they entered the hall tending to call the attention of anyone to the use to which the portion of the building on the east side of the hallway was being put, and it is not shown that this odor had been perceptible at any time before the officers entered the hallway, though it does appear from the testimony of the witness, Rodda, while testifying for the Government, that it takes all the way from eight to twelve days for fermenting mash to give off an odor and that the odor does not become strong until it is ready for distillation. (R. p. 24.)

There is absolutely nothing in the record showing when the plaintiff in error was last in the building.

So, as far as the record is concerned, it is entirely barren of anything which could reasonably be held to prove that there was any suspicious fact or circumstance which should have called his attention to the illicit use to which the property was being put. Even if he had had actual knowledge that mash was fermenting on the east side of the house and that there was a still there, and that there was intoxicating liquor kept there intended for use in violation of the National Prohibition Act, these facts would not justify a verdict of guilty in this case in the absence of a showing of other facts connecting him with the transportation of which the record is entirely barren.

It is settled law that one who is possessed of knowledge of the commission of an offense which knowledge he fails to disclose, may not upon proof of such facts alone, be held guilty of crime:

State v. Brown, Wash. 209 Pac. 855, 857;
Bird v. U. S. 187 U. S. 118, 133; 47 L. ed. 100, 106.

And in recognition of this principle, Congress definitely fixed the penalty to be imposed upon a person who having knowledge or reason to believe that his premises were being occupied or used for the manufacture or sale of intoxicating liquor suffers the same to be so occupied or used.

Section 21 of the National Prohibition Act, after defining a common nuisance and fixing the penalty to be

imposed on one guilty of maintaining a common nuisace, proceeds as follows:

> "If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction." (41 Stat. L. 313.)

So on the record, there is no substantial evidence justifying the verdict of guilty returned on the Fifth Count contained in the Information.

Such was the holding of the Criminal Court of Appeals of Oklahoma in a case practically on all fours with the case at bar:

Webb v. State — Okla., Cr. A. — 211 Pac. 524.

Specification Number Eleven.

This specification is based upon the statement of the court made in the presence of the jury when overruling the Motion of plaintiff in error for a directed verdict.

At that time, the court stated "the evidence is enough to hang a man if he was on trial for murder. The Motion is denied." (R. p. 91.)

We admit that under the federal practice, a trial judge has a right while charging the jury, to comment on the

evidence for the purpose of making the issues clear and assisting the jury in arriving at a just and proper verdict in the case on trial. However, we insist that no Federal Judge sitting in the trial of a criminal case has a right in the presence of the jury to make a comment of the kind the trial court in this case did make in denying a motion for a directed verdict. When the remark was made the trial judge was not charging the jury concerning the law and the facts in the case. The statement was out of place and showed to the jury clearly and pointedly what the opinion of the judge of the trial court then was on the question the jury was later called on to decide. All of the testimony offered by the plaintiff in error was received by the jury after that statement was made, and it might reasonably be and probably was not given the same weight or credence that it would otherwise have been given and from that point on, the jury reasonably might and no doubt did consider everything said and done in the light of the statement on which this specification is based.

And the jury might reasonably have inferred that if the evidence was strong enough to justify the hanging of the plaintiff in error if he were being tried on a capital charge, it was more than enough to justify his conviction in the case then on trial and in which the greatest punishment that could be inflicted was imprisonment.

Any lawyer of experience knows that at all times through a trial, men sitting on the jury are anxious to learn the opinion of the trial judge concerning the merits of the controversy, and that they are often quick to

grasp at any intimation as to what the opinion of the trial judge concerning the evidence in the case and its weight is and are apt to and often do base their verdict on an ill considered statement of the trial judge rather than upon that careful, deliberate consideration of the evidence which alone should guide them in determining questions involving the liberty of one accused of crime.

In the circumstances of the case, the remark of the trial judge reasonably might and no doubt did prejudice the plaintiff in error in the eyes of the jury and injuriously affected him in his substantial rights.

Specifications Number Twelve, Thirteen and Fourteen.

Under these specifications, plaintiff in error contend that there is no substantial evidence on the entire record in the case sustaining the charge contained in the Third, Fourth and Fifth Counts of the Information herein.

The sufficiency of the evidence offered by the Government has been argued at length under Specification of Error Number Ten above and we will not discuss further the testimony given by the Government's witnesses but will turn to the other evidence in the record.

It is clear that the Government's case was not strengthened in any way by any evidence offered on behalf of the plaintiff in error.

From the testimony of Mrs. Carney, the wife of the plaintiff in error, it appears that the building in which the liquor, mash and still were stated to have been found is a five room frame building with a hallway running straight through from the front door with two rooms on

the east side and three on the west side and hot and cold water to supply the house keeping rooms; the rooms on the east side of the hallway were fitted up for house keeping (R. p. 101); that Mr. and Mrs. Carney occupied the three rooms on the west side; that for six years immediately preceding the time the officers went to the premises, the rooms on the east side of the hallway had been rented and that they were rented through the month of April, 1922, and that Mrs. Carney had no control over those rooms during that month up to the time the officers came there, the key having been turned over to the renter (R. p. 92 and 93); that at the time the officers came to the house, the plaintiff in error was working at the Bell Mine, where he was constantly employed (R. pp. 93 and 94); that when Mr. Bolton asked admission she was not fully dressed and her baby was sick and crying and she could not let him in at once (R. pp. 94 and 95); that she did not know that the liquor, mash or still was in the east side of the building until the officers discovered them in making the search (R. p. 96).

Mrs. Gannon testified that she had been familiar with the premises for about seven years and that in the early part of April, 1922, while she was visiting Mrs. Carney, there, Mrs. Carney made her acquainted with O'Donnell, who was renting the rooms on the east side of the building, and that she saw O'Donnell in those rooms on one other occasion thereafter and prior to the time the officers went to the premises (R. pp. 103-5).

William Colmer testified that he was a solicitor for

the Gallagher Grocery Company; that for a period of more than six years he had solicited in the building for orders for groceries and during that time the Carneys always lived on the west side of the hall and the rooms on the east side of the hall had always been rented; that he went to the building for the purpose of soliciting orders for groceries at least once a week; that during the month of April, 1922, he got orders for groceries from Pat O'Donnell, who was occupying the rooms on the east side of the building and that he never noticed any smell of mash or anything like that in the building. (R. pp. 106-109.)

Martin Walsh testified that he had been acquainted with the premises for about six years and that during the month of April, 1922, the rooms on the east side of the hall were used by Pat O'Donnell and that at all times during the six years immediately preceding the time when the officers searched the rooms on the east side of the building, the Carneys lived in the rooms on the west side of the hall and never lived in or used the rooms on the east side of the building. (R. pp. 112 and 114.)

Joe Nevin, under whose immediate direction plaintiff in error had worked for a number of years, testified to his capacity and constant employment and good character. (R. pp. 114-116.)

The plaintiff in error testified that for more than six years he had been livingg with his family at 205 West Quartz Street; that he had never lived in the rooms on the east side of the building; that those rooms had al-

ways been rented; that Mrs. Carney had charge of the renting of those rooms and he paid very little attention to it; that during the month of April, 1922, the rooms on the east side of the hallway were rented by Pat O'Donnell; that the witness did not know that there was any mash, still or moonshine on the premises at any time prior to the time the officers made the search. (R. pp. 118 and 119.)

So on the record we submit that there is no substantial evidence in the case sustaining the charges contained in the Third, Fourth or Fifth Count of the Information.

Specification Number Fifteen.

The Court Erred In Its Charge To The Jury:

During the course of its charge to the jury, the court used the following language:

"Now, then, Gentlemen of the jury, if the defendant had no part in carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash, and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, working together in violation of the law? You are not to be hoodwinked and bambooz-

led by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored predecessor, Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experience, conceive what your own conduct would be if across your hallway from your kitchen door of your own home a tenant set up a moonshine outfit and make moonshine whiskey, would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business?" (R. p. 132.)

This portion of the charge was excepted to by the plaintiff in error. (R. p. 134.)

The words "bamboozled" and "hoodwinked" and "gulled" have a very definite and well understood meaning and when these words are used in the charge of the court are viewed in connection with the comment of the court concerning the testimony given by the witnesses for the plaintiff in error, the jury would reasonably be

led to believe that the witnesses for the plaintiff in error were trying to deceive and impose upon them and to practice trickery and deception and had been guilty of perjury in an effort to cover and conceal the true facts as a result of which the jury reasonably might have been and no doubt was led in arriving at their verdict in the case, to act upon the theory that the witnesses for the plaintiff in error were not testifying truly.

It is true that by possible construction, the court's remark could be made applicable to the witnesses for the Government as well as to the witnesses for the plaintiff in error. However, when it is recalled that the testimony given by the witnesses for the Government as to what they found in the premises and the condition under which they found it, which is all of the testimony on which the Government's case rests, was not contradicted and was tacitly taken as admitted throughout the trial, the reasonable and only possible effect of the portion of the charge complained of was to direct the attention of the jury unfavorably to the testimony given by those testifying on behalf of the plaintiff in error, which reasonably might and no doubt did discredit them in the minds of the jury and improperly affected the substantial rights of the plaintiff in error.

This portion of the charge to the jury could have had but one effect when considered in the light of the remark of the court that "the evidence is enough to hang a man if he was on trial for murder" made by the court at the time the Motion of plaintiff in error for a directed verdict was denied. (R. p. 91.)

Specification Number Sixteen.

The Court Erred In Denying The Motion of The Plaintiff In Error For a New Trial.

The duty of a court with reference to the granting of new trial has been clearly stated by courts of highest authority.

In the case of Pleasants v. Fant, 89 U. S. 116, 121-2; 22 L. Ed. 780, 782, Mr. Justice Miller, speaking for the court used the following language:

> "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.
>
> "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law

of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not then it is the duty of the court after a verdict to set it aside and grant a new trial." (22 L. Ed. p. 783.)

On the whole record, the condition shown is such that the trial court, in the exercise of a sound, legal discretion, should have granted the Motion of the plaintiff in error for a new trial and this refusal to do so was error.

On the record it appears that the plaintiff in error was improperly arrested, brought into court and tried; that the charges contained in the counts on which he was found guilty are not sufficient in law; that there is no substantial evidence sustaining the conviction on those charges; that there was error in the admission of testimony offered by the Government over the objection of the plaintiff in error; that the trial court erred in making the remark made at the time the Motion of the plaintiff in error for a directed verdict was denied, and that the court erred in its charge to the jury and in denying the Motion of the plaintiff in error for a new trial, as a result of which the judgment and verdict should be set aside and a new trial ordered.

Respectfully submitted,

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Service of the above and foregoing Brief acknowledged and copy thereof received at.....
Montana, October....., 1923.

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United States Attorney for the
District of Montana.